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No. 611

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1962

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PUBLIC UTILITY DISTRICT NO. 1 OF PEND OREILLE COUNTY, WASHINGTON, *Petitioner*

v.

FEDERAL POWER COMMISSION, and CITY OF SEATTLE

---

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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November 24, 1962

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**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT**

---

Certiorari is respectfully sought to review the Court of Appeals affirmance of FPC orders which, on conflicting applications by two municipal corporations for a large new hydroelectric project in the State of Washington, granted Seattle a license and denied petitioner a license.

## OPINIONS BELOW

The hearing examiner's decision (S.J.A. 225-309),[1] recommending grant of a license to Seattle, is reported at 26 FPC 61. FPC's first order (S.J.A. 218-225), granting Seattle the license, is reported at 26 FPC 54; its order denying rehearing (S.J.A. 311-321) is reported at 26 FPC 463. The Court of Appeals order of August 29, 1962 (Appendix A, *infra*), denying petitioner's motion to stay proceedings until the state courts definitively determined the state law question, is unreported. The Court of Appeals opinion of August 30, 1962 (Appendix B, *infra*), affirming FPC, is not yet reported.

The Supreme Court of Washington's July 12, 1962 opinion (Appendix C, *infra*) in the related case of *Beezer* v. *City of Seattle*, determining that the state courts have jurisdiction and directing the state court to proceed to determine the state law question, is reported at 160 Wash. Dec. 241, 373 P. 2d 796. Its October 2, 1962 opinion (Appendix D, *infra*) in the same case, denying Seattle's motion to dismiss, is reported at 160 Wash. Dec. 652, P. 2d .

## JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. §1254(1), 28 U.S.C. §2101(e), and 16 U.S.C. §825*l*(b). On August 29, 1962, the Court of Appeals ordered (R. 359) that petitioner's motion to defer decision, or in

[1] "R." refers to the record as certified to this Court by the Court of Appeals. "J.A." and "S.J.A." refer respectively to the Joint Appendix and Supplemental Joint Appendix, as reproduced for the Court of Appeals; besides the copy included in the certified record, petitioner has filed nine copies thereof with this Court. "Tr." refers to the transcript of record certified by FPC to the Court of Appeals.

the alternative to remand, in the light of the Supreme Court of Washington's *Beezer* ruling, be denied. On August 30, 1962, the Court of Appeals rendered its opinion (R. 377-386) and judgment (R. 387). This petition is filed within ninety days.

## QUESTIONS PRESENTED

Petitioner (a public utility district) and the City of Seattle are Washington municipal corporations. Each filed a license application with Federal Power Commission for a large new hydroelectric project on the Pend Oreille river in northeast Washington. The two projects are mutually exclusive, because a dam at either site will make the other useless: Petitioner already owns the two dam sites and the shorelands of the river above; and a Washington statute (Revised Code of Washington, § 35.84.030) prohibits a city from condemning any part of the electric system "belonging to or owned or operated by" a public utility district. Seattle cannot acquire petitioner's properties, indispensable to Seattle's project, unless Seattle may condemn them despite the express prohibition which this Washington statute imposes on Washington cities. Before the hearing began, petitioner moved for dismissal of Seattle's application because Seattle lacked legal capacity under Section 9(b) of the Federal Power Act, which requires that an applicant comply with state law with respect to bed and banks of the river. FPC, however, proceeded to hear the two conflicting applications. This was a contested proceeding in which the Federal Government had numerous direct interests, including substantial federal interests clearly within official responsibilities of Bureau of Mines, Bureau of Reclamation and other Interior Department agencies. Despite the conflict of interest laws, Seattle nevertheless

employed privately, and privately used and paid for, extensive services of regular full-time federal employees of the Bureau of Reclamation to prepare and present essential parts of Seattle's case in the contest before FPC. The questions presented are:

1. Whether, despite the Washington statute (§35.84.-030) which affirmatively prohibits the State's own cities from condemning electric properties of the State's own public utility districts, the Federal Power Act (Section 21) nevertheless should be interpreted—or constitutionally may be interpreted—as overriding the Washington statute and endowing Seattle with power to condemn such properties; and whether Seattle lacked legal capacity as an applicant under Section 9(b) of the Federal Power Act, if petitioner's specific properties, indispensable to Seattle's project, are properties which the Washington statute has forbidden Seattle to condemn and which Seattle cannot otherwise acquire; and in any event, whether the State of Washington's strong policy of regulating the relationship between its own municipal corporations should have been uprooted.

2. Whether it was error for the Court of Appeals to refuse to defer the federal proceedings to await the outcome of pending state court litigation wherein Washington's highest court had directed that a definitive state law determination be made as to whether petitioner's specific properties (indispensable to Seattle's project) do or do not come within the prohibitory Washington statute—such refusal to defer causing the Court of Appeals to make a premature decision of an important constitutional question and creating a needless, unseemly and serious conflict with the Washington state courts.

3. Whether, in a contested federal administrative proceeding in which the Federal Government has exten-

sive, direct and substantial interests, the federal conflict of interest statutes and policies permit a contesting applicant (Seattle) to use the services, the work product and the testimony of regular full-time Federal Government employees whose services the applicant has privately retained and paid for to build up and present essential parts of the applicant's case; or whether instead the federal conflict of interest statutes and policies require that (at the minimum) this fundamental portion of Seattle's case be excluded.[2]

## STATUTES INVOLVED

The pertinent statutes are in Appendix E, *infra*.

## STATEMENT OF THE CASE

This case is in the courts on review of a contested federal licensing proceeding. It involves important questions of statutory interpretation, of constitutional law, and of legal and judicial policy, concerning the respective powers of the Federal Government and the States, in connection with a State's sovereign power to control the relationship between its own municipal corporations. It also involves important questions as to the scope and application of federal conflict of interest laws and policies.

In 1953, while petitioner was constructing a hydroelectric project on the Pend Oreille river at a site known as Box Canyon (18 miles from where that Columbia river tributary crosses the Canadian border), petitioner purchased the shorelands extending from

[2] A subsidiary question, reserved for argument if certiorari is granted, is whether FPC erred in denying petitioner's applications to subpoena two Interior Department officials for the purpose of establishing on the record all facts (including Seattle's *ex parte* representations to the Interior Department) concerning Seattle's conflict of interest violations.

Box Canyon almost to the border.[3] This purchase included the two dam sites, a mile apart, known as Boundary and Z Canyon. Petitioner also acquired detailed plans for a hydroelectric development at Z Canyon, whose rock foundations had been fully tested and explored. Petitioner's purpose was to construct a dam to be operated in coordination with petitioner's Box Canyon project and thus complete full development of the water resources of the Pend Oreille river. Despite these facts, in October 1953 Seattle filed application with FPC for a preliminary permit covering the Boundary site.

Thereafter, petitioner and Seattle each filed conflicting applications with FPC for a license. Petitioner's Z Canyon project and Seattle's Boundary project are mutually exclusive, because a dam at either site will make the other useless.

FPC consolidated the applications for hearing. Extensive hearings, held before an examiner, dealt largely with the comparative merits of the two projects in the light of Federal Power Act criteria. One of the main issues in the hearing was the possible danger of catastrophic flooding whereby Seattle's project would destroy life and property and would seriously jeopardize the future development of vast lead and zinc deposits having strategic importance. It was this mine damage problem which had led the Interior Department

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[3] Petitioner is a municipal corporation created in 1936 by the citizens of Pend Oreille County, pursuant to a Washington statute authorizing establishment of public utility districts "to conserve the water and power resources of the State of Washington for the benefit of the people thereof, and to supply public utility service, including water and electricity for all uses." Washington Laws of 1931, c. 1, §§ 1 and 2 (Revised Code of Washington, § 54.04.020).

to oppose Seattle's project as early as 1954 (J.A. 144), after Seattle applied to FPC for a preliminary permit.

The examiner recommended (S.J.A. 225-309) a license be issued to Seattle and denied to petitioner. By order of July 10, 1961 (S.J.A. 218-225), FPC modified and adopted the examiner's decision, thus granting Seattle a license and denying petitioner a license. On application for rehearing, FPC made one modification, not material here, and denied rehearing (S.J.A. 311-321). Petitioner filed a timely petition for review in the Court of Appeals, which now has affirmed FPC (Appendix B, *infra*; R. 377-387).

Two groups of issues which compellingly call for full review by this Court have arisen in the course of the proceedings below.

*Federal-State Conflict as to Seattle's Lack of Capacity.* Before the hearings began, petitioner moved (Tr. 20279-20297) to dismiss Seattle's application because of Seattle's inability to comply with Section 9(b) of the Federal Power Act, 16 U.S.C. §802(b), [p. E-2, *infra*]. Petitioner's grounds were that the properties owned by petitioner included bed and banks of the Pend Oreille river which are indispensable to Seattle's project; that Seattle could not acquire those properties from petitioner by purchase; that the Washington statute, Revised Code of Washington, §35.84.030 [p. E-3, *infra*], affirmatively prohibits a city from condemning "the electric power and light plant or electric system, or any part thereof, belonging to or owned or operated . . . by a public utility district";[4] that the

[4] Washington also has a statute which, reciprocally, prohibits a public utility district from condemning a "public utility owned by a city". Revised Code of Washington, § 54.16.020.

properties in question are a part of petitioner's electric system within the meaning of this Washington statute and thus are shielded from condemnation by Seattle; and that Seattle hence could not comply with the Section 9(h) requirement that an applicant submit satisfactory evidence of compliance with state law "with respect to bed and banks".

FPC refused at this stage to pass upon the merits of petitioner's motion, deferring action on it until after the examiner heard the case (S.J.A. 227). The examiner in his decision rejected petitioner's contentions. He held (S.J.A. 227-229) that although under existing circumstances Seattle's acquisition of petitioner's properties was impossible without condemnation, nevertheless if Seattle received a federal license, then Seattle's power to take petitioner's properties by eminent domain was established by this Court's decision in *City of Tacoma* v. *Taxpayers*, 357 U.S. 320, regardless of whether the prohibitory Washington statute (§35.84.030) covers these particular properties.

On this issue FPC's first order sustained the examiner without further comment (S.J.A. 219-220). In its order denying rehearing FPC held: "We need not decide in this proceeding whether Seattle is prohibited by state law from acquiring the particular properties of [petitioner] in question. In our opinion Seattle's right to acquire these properties by the exercise of the power of eminent domain under Section 21 of the Federal Power Act is well established" (S.J.A. 316).

In the Court of Appeals the briefs called attention to a taxpayer's suit, *Beezer* v. *City of Seattle*, which meanwhile had been instituted in the Washington state courts. The suit (in which petitioner had intervened) sought a declaratory judgment declaring that, because

of the Washington prohibitory statute (§35.84.030), Seattle's condemnation of petitioner's properties would be illegal and void. The *Beezer* case was then on appeal to the Supreme Court of Washington, the trial court having dismissed the complaint as an "impermissible collateral attack" on the federal proceeding.

Prior to oral argument in the Court of Appeals petitioner, relying on this Court's decisions concerning the "abstention" doctrine, moved (R. 336-344) for a stay of Court of Appeals proceedings pending the Supreme Court of Washington's determining in *Beezer* the Washington statute's interpretation and applicability. Petitioner's motion was denied (R. 345).

On July 12, 1962, before decision by the Court of Appeals, the Supreme Court of Washington decided the *Beezer* appeal (Appendix C, *infra*; R. 360-376). It reversed the summary dismissal of the complaint and directed the state trial court to determine whether these properties of petitioner are covered by the Washington statute (§35.84.030) and under state law are shielded from condemnation by a city. The Washington Supreme Court characterized the issue as "another and, as yet, unexplored facet of the obligation of a municipal corporation, existing under and by virtue of the laws of the state of Washington, to comply with the laws of that state" (p. C-1, *infra*). It held that the Washington statute prohibiting Seattle from condemning electric properties of public utility districts "is clearly a declaration of the public policy of the state, dating back thirty years, and is in no sense an attempt to exercise a veto" over federally licensed projects (p. C-4, *infra*); and that the state courts "should not hesitate to proceed" with the interpretation and application of the state statute (p. C-5, *infra*).

Petitioner promptly, on July 16, 1962, submitted the *Beezer* decision to the Court of Appeals and moved (R. 350-358) that the Court of Appeals either defer decision until final disposition of the state court case in the light of the *Beezer* opinion, or in the alternative remand the proceeding to FPC for reconsideration in the light of *Beezer*. On August 29, 1962, the Court of Appeals (Appendix A, *infra*; R. 359) granted petitioner leave to file the *Beezer* opinion, but denied the rest of petitioner's motion. The next day, in affirming FPC (Appendix B, *infra*; R. 377-387), the Court of Appeals held that this Court's decision in *City of Tacoma* v. *Taxpayers*, 357 U.S. 320, "makes it clear that the State statute here involved, even if according to its own terms it is applicable, cannot make it impossible for Seattle as a federal licensee to condemn under the federal statute" (p. B-9, *infra*).

The Court of Appeals also said (p. B-9, *infra*) "it does not appear that the land owned by [petitioner] and needed by Seattle is a part of the former's electric plant or system which the Washington statute protects from condemnation by a city or town". This comment seems astonishing since the question of state law was one which FPC had expressly refused to decide or make findings on (p. 8, *supra*); the record furnished no grounds for deciding the state law question adversely to petitioner; and the Court of Appeals wholly ignored and disregarded the *Beezer* opinion of the Supreme Court of Washington, which had just directed the state trial court to make a definitive determination of this state law question.

After the Court of Appeals decision, Seattle moved in the Supreme Court of Washington to dismiss the *Beezer* appeal and action, claiming that the state court

case had been rendered moot by the Court of Appeals decision. With a further opinion (Appendix D, *infra*), the Supreme Court of Washington denied this motion (it also denied Seattle's petition for rehearing). Trial in the state court was delayed, however, by Seattle's then filing in the Supreme Court of Washington a motion for a stay until final action by this Court. On November 19, 1962, the Supreme Court of Washington denied the stay.

*Issues Arising out of Seattle's Conflict of Interest Violations.* The federal conflict of interest laws and policies prohibit the private employment of federal employees for pay in proceedings in which the United States has an interest (18 U.S.C. §281 and §2; p. E-1, *infra*). In this proceeding the Government's interests are direct and unusually substantial. Among others, the record shows in considerable detail a series of positions taken, and views expressed, and federal interests being watched over, by the Interior Department and its constituent agencies—Bureau of Mines, Geological Survey, Fish and Wildlife Service, and Bureau of Reclamation (J.A. 143-151, 50-52, 164-166).[5]

The record shows that the Interior Department by letters to FPC repeatedly opposed Seattle's Boundary project because of the danger to mining operations (J.A. 143-145, 164-166). During the course of the hearings three witnesses—two from Bureau of Mines and one from Geological Survey—were furnished by the Interior Department (J.A. 148) and presented data showing the strategic importance of these vast lead and zinc deposits to the nation's future national security,

[5] The nature of the specific interests of Bureau of Reclamation in this proceeding is summarized by documents at J.A. 50-52, 143, 149, 165.

and the hazard which would result from construction of a high dam in the area (Tr. 8233-8357, 15755-15899, 15902-16282). At the end of the hearing the Interior Department wrote a final letter opposing the grant of a license in view of the mine damage problem (J.A. 164-166).

In addition, the record shows the positions taken by the Army's Office of the Chief of Engineers on navigation aspects of the two competing applications (J.A. 139-140), and by the Agriculture Department's Forest Service concerning license conditions to protect Colville National Forest (J.A. 141-142). And Congress has placed in FPC itself the responsibility for protecting federal interests under the Federal Power Act, 16 U.S.C. §791a-823, including the statutory command that FPC act "in the public interest" in development of water resources, 16 U.S.C. §§800(a), 803(a), and the specific pecuniary provision directing FPC to fix charges a licensee will be required to pay the United States, 16 U.S.C. §803.

The Federal Government's direct and substantial interests in such FPC proceedings—and the official responsibilities of the federal agencies, including Bureau of Reclamation and other Interior Department units, in protecting these Government interests—are facts exceptionally well known. Indeed, in this particular case Seattle and FPC had known as early as 1954 that the Interior Department opposed Seattle's Boundary project (J.A. 144; see pp. 6-7, *supra*). Nevertheless, through a firm called Savage and Associates, Seattle proceeded to make private arrangements to retain the services of, and to use and privately pay for the work of, Ireal A. Winter and more than twenty

other regular full-time Bureau of Reclamation employees (J.A. 32-40, 81-84, 200-201, 206).

Winter, an engineer, had been continuously employed for about twenty-five years, since 1933, as a regular full-time employee of the Interior Department's Bureau of Reclamation, and was Chief of the Bureau of Reclamation's Hydraulic Machinery Branch at the time he performed this work for Seattle. Seattle privately retained and paid Winter to perform this work and to prepare testimony as one of the principal expert witnesses in presenting essential parts of Seattle's case to FPC. He testified that he was employed to determine the power potentialities of this reach of the Pend Oreille River, considering the costs and the engineering feasibility of the sites which might be selected (J.A. 54); that he had about ten other Bureau of Reclamation employees working under his supervision on Seattle's project (J.A. 34-35). He supervised preparation of preliminary layouts of several alternates to determine costs and engineering feasibility (J.A. 54); he supervised preparation of drawings covering the power features of Seattle's project (J.A. 34, 55), engineering design of the power plant (J.A. 55-56), the powerhouse structure, the generators and other equipment to be installed at the project and the transmission plant (Tr. 857-869). Winter presented these materials in his testimony, and he took responsibility for Seattle's cost estimates for the project's power features (J.A. 58-60).[6]

[6] Extraordinary circumstances surrounded Winter's appearance as a witness. About three months before the hearings opened, the Bureau of Reclamation, because of its concern over conflicts of interest, refused Winter's request that he be allowed to appear as Seattle's witness (J.A. 18-19, 202-203). Thereafter Seattle made *ex parte* representations to the Interior Department, saying

Winter also testified that in his opinion Seattle's Boundary project, as a power site, is the best site for developing the full potentiality of this stretch of the Pend Oreille river (Tr. 869; J.A. 57-58). In addition, Winter participated in preparing materials used by other Seattle witnesses, and helped develop data for Seattle's cross-examination of petitioner's witnesses (J.A. 73). Another group of regular Bureau of Reclamation employees, whose services were likewise privately paid for by Seattle (J.A. 81-84), prepared the designs, and assisted in the cost estimates, for the dam and related structures (Tr. 1790; Tr. 1792-1802).

To all this, petitioner strenuously objected at the outset and throughout the hearings. Petitioner urged that Seattle's course of conduct involved serious violation of federal conflict of interest laws and policies—particularly in the light of 18 U.S.C. §281 (p. E-1, *infra*), which prohibits federal employees from directly or indirectly receiving or agreeing to receive compensa-

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"that their case was built around Mr. Winter's testimony and that it would be a very expensive and time-consuming thing to start over" (J.A. 203, 50). As a result, the Bureau granted Winter permission to testify (J.A. 203). When at the outset of the hearings petitioner, having just seen Winter's prepared testimony, questioned the propriety of Seattle's using Winter as a witness or using any other evidence based on Winter's work (J.A. 6-10), the Commissioner of Reclamation revoked Winter's authorization to testify (J.A. 42-43). Seattle then by *ex parte* action obtained from the examiner a subpoena which it served on its witness Winter (Tr. 808-809, 824, 20415-20416; J.A. 29); the examiner quashed the subpoena (Tr. 816, 832-833) and then reinstated it when a new letter was produced from the Interior Department stating that, in view of Interior's policy to permit its employees to testify in any legal or regulatory proceedings, Winter had permission to testify (J.A. 49-53). A subsequent Interior Department letter stressed that the question whether Winter's testimony should be received and utilized was a matter it thought FPC, not Interior, should determine (J.A. 88-90).

tion for any services rendered, in relation to any proceeding, controversy or other matter in which the United States is directly or indirectly interested, before any department, agency or officer; and 18 U.S.C. §2 (p. E-1, *infra*), which provides that whoever aids, abets, counsels, commands, induces or procures the commission of an offense against the United States is punishable as a principal. In view of these strong federal statutes and policies, petitioner contended that any "clearance" which Bureau of Reclamation employees may have obtained to perform outside work could not give sanction to Seattle's use of such tainted evidence in this contested licensing proceeding. Petitioner's position was that, as a minimum, Winter's testimony and the other Seattle evidence based on the work of the Bureau of Reclamation employees should be excluded; and further, that Seattle's conduct disqualified Seattle as an applicant.

The examiner overruled all petitioner's objections (J.A. 36; Tr. 748-757; Tr. 816; J.A. 56-57; S.J.A. 229-233).[7] Moreover, his decision shows that the examiner, deeming Winter's qualifications "most impressive" (S.J.A. 230-231), relied extensively on the work Seattle had paid Winter and the other Bureau of Reclamation employees to perform. FPC similarly rejected petitioner's contentions on the conflict of interest issues (S.J.A. 219-220; S.J.A. 316-317).

In affirming, the Court of Appeals held that the grant of a license to Seattle was not required to be set aside

[7] The examiner also denied petitioner's applications to subpoena two Interior Department officials for the purpose of establishing on the record all the facts (including Seattle's *ex parte* representations to the Interior Department) concerning Seattle's conflict of interest violations (Tr. 888; J.A. 61-62; J.A. 214-215; Tr. 1584-1593; Tr. 2044-2049).

because of "a technical violation" of the conflict of interest statutes which may have occurred (pp. B-4 and B-5, *infra*). Emphasizing that "no corrupt or venal motive is shown on the part of Seattle or the Bureau of Reclamation engineers", and that the Government had not instituted any criminal prosecution, the Court of Appeals held this was not "the 'influence peddling' at which §281 was aimed."

## REASONS FOR GRANTING THE WRIT

### A. FEDERAL-STATE CONFLICT AS TO SEATTLE'S LACK OF CAPACITY

#### 1. Conflict With Supreme Court of Washington

The Court of Appeals decision establishes a direct conflict between the Court of Appeals and the highest court of the State of Washington as to the impact of the Federal Power Act upon the State's control over the relationship between its own municipal corporations. That conflict involves grave and far-reaching issues concerning federal-state relationships. They are issues which have not heretofore been decided by this Court, and this Court should review and resolve them.

As stated (p. 10, *supra*), the Court of Appeals decided that the Federal Power Act's eminent domain provision endows Seattle with the power as a licensee to condemn electric properties of state public utility districts even though for thirty years the State by statute has forbidden its cities to exercise such power.[8] Squarely in conflict with this are two decisions of the Supreme Court of Washington, in the recent case of *Beezer* v. *City of Seattle* (Appendix C and Appendix D, *infra*; see pp. 8-11, *supra*) and in *City of Tacoma* v. *Taxpayers*, 49 Wash. 2d 781, 307 P. 2d 567 (1957).

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[8] As appears (p. 22, *infra*), this Washington statute is in no sense a "veto" law which prevents construction of a dam in a navigable river.

In *Beezer* the Supreme Court of Washington not only adhered to its earlier ruling in *Tacoma* that the Federal Power Act does not and cannot confer on a Washington municipality authority to condemn property of a particular type when the municipality lacks an express authorization under state law to make such a condemnation; but it also pointed out that here there exists an express prohibition against condemnation.

The Supreme Court of Washington ruled in *Tacoma* (49 Wash. 2d at 800, 307 P. 2d at 577):

> "The Federal government may not confer corporate capacity upon local units of government beyond the capacity given them by their creator, and the Federal Power Act, as we read it, does not purport to do so."

Although on writ of certiorari this Court reversed the judgment, *City of Tacoma* v. *Taxpayers*, 357 U.S. 320, the reversal rested solely on the ground of res judicata. This Court held that, in the light of proceedings in the Ninth Circuit several years before (*State of Washington Dept. of Game* v. *Federal Power Comm'n*, 207 F. 2d 391, certiorari denied, 347 U.S. 936), the State of Washington and its citizens were foreclosed by the Court of Appeals judgment from litigating further Tacoma's power and authority to proceed under its license. Accordingly this Court has neither approved nor disapproved the ruling and interpretation by the Supreme Court of Washington on the merits in *Tacoma*, so that the ruling and interpretation remain unimpaired. Thus there now exists a direct conflict between the law as declared by the Supreme Court of Washington and the present decision of the Court of Appeals.

The Court of Appeals did not agree with petitioner's analysis of this Court's decision in *Tacoma*—and we contend this was serious error (p. 19, *infra*). In any event it is clear that the Supreme Court of Washington, like petitioner, takes the opposite view, as shown by *Beezer*; there it held unequivocally that its *Tacoma* decision had not been the subject of any ruling on the merits by this Court in *Tacoma*.[9]

Moreover, in *Beezer* the Supreme Court of Washington has pointed out that Seattle not merely lacks express authority, but instead is faced with an affirmative statutory prohibition of long standing in its charter (p. C-3, *infra*):

> "We do not regard anything actually decided in the Cowlitz [*Tacoma*] litigation as decisive of the present case. In the first place, it was conceded that when the city of Tacoma received its license to proceed with the Cowlitz project and construct the necessary dams, there was nothing limiting its authority so to do. Here, the city of Seattle, at the time it applied for its license to proceed with the Boundary project, had a known and express limitation on its power, *i.e.*, it could not condemn
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> > '. . . the electric power and light plant or electric system, or any part thereof, belonging to or owned or operated . . . by a public utility district' ".

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[9] See pp. C-3 and C-4, *infra*: "it has been, and is, our view that the Supreme Court of the United States in *City of Tacoma* v. *Taxpayers* . . . did not pass upon the proposition which we deemed decisive . . . *i.e.*, that the Federal government may not confer powers upon local units of government created by the state beyond the capacity given them by their creator. The Supreme Court of the United States reversed our decision in that case on the basis of res judicata, . . .".

Seattle's lack of capacity under such circumstances receives further emphasis from what this Court said in *Dallemagne* v. *Moisan*, 197 U.S. 169, 174:

> "It has long been held that power may be conferred upon a state officer, as such, to execute a duty imposed under an Act of Congress, and the officer may execute the same, unless its execution is prohibited by the Constitution or legislation of the State."

**2. Misinterpretation of This Court's Tacoma Decision**

Apart from the conflict with the Supreme Court of Washington, the Court of Appeals on this point based its decision on serious misinterpretation and misapplication of this Court's ruling in *City of Tacoma* v. *Taxpayers, supra.* The Court of Appeals held (p. B-9, *infra*) that this Court's *Tacoma* ruling "makes it clear that the state statute, even if according to its own terms it is applicable, cannot make it impossible for Seattle as a federal licensee to condemn under the federal statute." But as already shown (pp. 17-18, *supra*), this Court rested *Tacoma* solely on res judicata grounds, without in any way intimating a view as to the merits of the vital state-federal question involved. In deciding that *Tacoma* stands for exactly the opposite, the Court of Appeals (like FPC) fundamentally misinterpreted *Tacoma* on a matter of lasting significance to federal-state relationships. Such misinterpretation calls for review and correction by this Court.

**3. Importance of Federal-State Conflict Created by Disregard of Constitutional and Congressional Standards**

The Court of Appeals decision disregards the clear intent of Congress that FPC shall not infringe on the sovereign authority of the States. This decision creates a basic federal-state conflict of grave constitu-

tional and statutory dimensions, which this Court, in any event, should review.

On at least two occasions in recent years this Court has extensively considered the Federal Power Act's history and objectives and has emphasized the purpose of Congress not to infringe on the sovereign rights of the States. *First Iowa Coop.* v. *Power Comm'n*, 328 U.S. 152;[10] *F.P.C.* v. *Niagara Mohawk Power Corp.*, 347 U.S. 239, 251-253.

This Court has repeatedly declared and sustained the sovereign power of a State to control the activities of its own municipal corporations. *Hunter* v. *Pittsburgh*, 207 U.S. 161, 178-179; *Pawhuska* v. *Pawhuska Oil Co.*, 250 U.S. 394, 397-399; *Williams* v. *Mayor*, 289 U.S. 36, 40. Subject to the narrow exceptions necessary to prevent federal constitutional guaranties from being "manipulated out of existence", *Gomillion* v. *Lightfoot*, 364 U.S. 339, 345, it is the State and not the Federal Government which determines and controls what powers shall be conferred on, and what powers shall be withheld from, the State's municipalities.

In deciding that the Federal Power Act overrides the Washington statute which forbids Washington cities from condemning electric properties of public utility districts, the Court of Appeals thus overturned the repeated mandate of this Court. In so doing, the

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[10] In *First Iowa* this Court, in discussing the duality of control for which Congress provided, said (328 U.S. at 167-168): "In the Federal Power Act there is a separation of those subjects which remain under the jurisdiction of the states from those subjects which the Constitution delegates to the United States and over which Congress vests the Federal Power Commission with authority to act. To the extent of this separation, the Act establishes a dual system of control. The duality of control consists merely of the division of the common enterprise between two cooperating agencies of Government, each with final authority in its own jurisdiction."

Court of Appeals has totally rejected the principle, so often applied by this Court, that Congressional enactments are to be interpreted in a manner which will avoid serious doubts as to their constitutionality. The Court of Appeals likewise has disregarded this Court's strong admonition that "In a dual system of government in which, under the Constitution, the States are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress." *Parker* v. *Brown*, 317 U.S. 341, 351; see also *Penn Dairies* v. *Milk Control Comm'n.*, 318 U.S. 261, 275; *Huron Cement Co.* v. *Detroit*, 362 U.S. 440, 443.

Such considerations underscore the necessity for granting the writ to give full review to the constitutional, statutory and policy implications of a decision which, if allowed to stand, would permit FPC to graft onto this shackled municipal corporation a federal power enabling Seattle to defy its creator and violate an express legislative prohibition on its charter. Nothing in the legislative history of the Federal Power Act provides any justification for such an extraordinary result. The fact is FPC has refused to determine the qualifications of the applicant under state law in the manner that Congress intended by Section 9(b) of the Federal Power Act.

The *Beezer* opinion (Appendix C, *infra*) manifests the gravity with which these issues are regarded by the highest court of the State of Washington. Washington, by legislation of long standing, has put into effect a state-wide policy intended to prevent its cities and its public utility districts each from using the power of eminent domain to interfere with the electric development and operations of the other (p. 7, *supra*). But the Court of Appeals decision would permit FPC

to uproot the State's internal regulation of the relationship between its two different types of municipal corporations—despite the fact that any applicant other than a city would not be disabled by this statute and could proceed to qualify as an applicant and could exercise all the powers conferred by the Federal Power Act. As the Supreme Court of Washington stated, the State law here "is in no sense an attempt to exercise a veto over said project" (p. C-4, *infra*).[11]

For the State of Washington—and for any other State which has imposed or in the future decides to impose such restrictions on its own subdivisions[12]—the Court of Appeals decision, unless reversed, would accomplish total defeat of the State's policy, though such policy is not in conflict with the objectives of the Federal Power Act. It is in the public interest that a decision fraught with such exceptional consequences should be fully reviewed by this Court.

**4. Improper Disregard of "Abstention" Doctrine**

The Court of Appeals, by refusing to defer decision until the state courts in *Beezer* could determine from the evidence whether petitioner's properties are such properties as the legislature intended to protect

[11] Thus the present statute is entirely different from the "veto" statutes involved in *First Iowa*, *supra*, and in the *Tacoma* litigation when it was before the Ninth Circuit in *State of Washington Dept. of Game* v. *Federal Power Comm'n*, 207 F. 2d 391, certiorari denied, 347 U.S. 936.

[12] Thus California has a reciprocal statutory prohibition directing that "property appropriated to the use of any county, city and county, incorporated city or town, or municipal water district, may not be taken by any other county, city and county, incorporated city or town, or municipal water district, while such property is so appropriated and used for the public purposes for which it has been so appropriated." California Code of Civil Procedure § 1240.3; see *County of Marin* v. *Superior Court*, 53 Cal. 2d 633, 349 P. 2d 526 (1960).

against condemnation (pp. 9-10, *supra*), has needlessly precipitated a constitutional conflict as to whether the federal or state sovereignty shall control the eminent domain powers of state subdivisions. The Court of Appeals action not only is in conflict with this Court's long line of decisions that the federal courts should abstain from reaching constitutional questions until after pertinent state law questions have been decided by the state courts, *Leiter Minerals, Inc.* v. *United States*, 352 U.S. 220, and cases cited, but it also conflicts with the Supreme Court of Washington's decision in *Beezer*.

In *Beezer*, the Supreme Court of Washington held that the controversy in the state court is whether petitioner's property, "which the city of Seattle concedes it intends to condemn, is within the statutory prohibition"; that "neither the Federal Power Commission nor the federal courts can make a conclusive determination on that point"; and that "We are here concerned with the interpretation and application of state law, and our courts should not hesitate to proceed with that interpretation and application" (pp. C-4 and C-5, *infra*).

A decision by the state court in *Beezer* will bring a definitive determination as to whether petitioner's specific properties come within the terms of the Washington statute, and hence a determination of the precise context in which these grave constitutional, statutory and policy issues must be considered. "One policy served by that practice is that of not passing on constitutional questions in situations where an authoritative interpretation of state law may avoid the constitutional issues. . . . Another policy served by that practice is the avoidance of abstract, hypothetical issues." *Government Employees* v. *Windsor*, 353 U.S. 364, 366.

In the circumstances actually presented and in the light of the rulings of this Court, the Court of Appeals should (as petitioner urged—pp. 9-10, *supra*) have availed itself of this easy opportunity to have the benefit of a definitive state court determination. The Court of Appeals' indifference to the state law and policy is manifested not only by its failure to obtain such a determination, but also by its intruding an astonishing speculative comment (p. 10, *supra*) concerning the state law question which the Supreme Court of Washington in *Beezer* had just directed the state trial court to determine definitively, and indeed by its total disregard of the *Beezer* decision other than to direct the clerk to receive the opinion for filing (Appendix A, *infra*).

As this Court said recently in *Martin* v. *Creasy*, 360 U.S. 219, 224:

> "Reflected among the concerns which have traditionally counseled a federal court to stay its hand are the desirability of avoiding unseemly conflict between two sovereignties, the unnecessary impairment of state functions, and the premature determination of constitutional questions. All those factors are present here."

These considerations should have prevailed in this case. See also *United Gas Co.* v. *Ideal Cement Co.*, 369 U.S. 134.

### B. VIOLATIONS OF FEDERAL CONFLICT OF INTEREST LAW AND POLICY

#### 1. Importance of Review by This Court

The conflict of interest issues (pp. 11-16, *supra*) raise a question of substantial importance to the integrity of governmental processes. It is a question which has not been, but should be, decided by this Court.

This question is whether, in a contested licensing proceeding in which the Federal Government is di-

rectly and vitally interested, a federal regulatory agency does or does not have a duty to prevent an applicant from basing its evidentiary case on testimony and work product obtained by the applicant's privately retaining and paying for the services of regular full-time federal employees. The issue is especially acute because here the federal employees (Seattle's witness Winter and the more than twenty others from the United States Bureau of Reclamation) were, while rendering the services for pay to the applicant, full-time employees of the very Government Department which opposed Seattle's application and was responsible for protecting numerous Government interests at stake in the licensing proceeding.

The decision of this question affects the proceedings of all federal regulatory agencies, and the rights and obligations of the parties in contests before such agencies. It goes to the heart of the standards of conduct permissible for federal employees generally and for persons who deal with them.

The federal policy is established by 18 U.S.C. § 281 (p. E-1, *infra*)[13]—one of several conflict of interest statutes "designed to prohibit government officials from engaging in conduct that might be inimical to the best interests of the general public". *United States* v. *Mississippi Valley Co.*, 364 U.S. 520, 548. The Bureau of Reclamation employees' activities, undertaken here at Seattle's behest, were in flagrant violation of

[13] The need for full review by this Court is made even more urgent by the recent revision of the conflict of interest laws as reflected in P.L. 87-849, approved October 23, 1962, and effective ninety days thereafter (76 Stat. 1119). Section 203 of P.L. 87-849 continues the substance of these prohibitions in full effect with respect to regular federal employees; the violations occurring here would equally be violations under P.L. 87-849. Accordingly, the Court of Appeals decision would thwart the purposes of this new statute just as effectively as it thwarts the purposes of the present statute.

Section 281's strong policy prohibiting federal employees from receiving compensation, or agreeing to receive compensation, for services in relation to any proceeding or matter in which the United States is directly or indirectly interested. *Burton* v. *United States*, 202 U.S. 344. Indeed, this "is the very conduct which section 281 was enacted to prevent"—as was so firmly stated in an Opinion of the Attorney General rendered to the President early this year (42 Op.Atty. Gen. No. 6, dated January 31, 1962, printed slip opinion, p. 11):

> "The full-time employee draws his basic income for his services from the Government and any outside employment, if permitted at all by regulation, is incidental and exceptional. The impropriety of such an employee's acceptance of compensation for private services before any Government department or agency springs instantly to mind. This factor was emphasized by Senator Trumbull in the statement already quoted. It is offensive to good morals and to common conceptions of what is ethical. It is the very conduct which section 281 was enacted to prevent."

And 18 U.S.C. § 2 (p. E-1, *infra*) underscores the fact that Seattle's course of conduct, equally with that of the Bureau of Reclamation employees, unmistakably violated this federal policy. *May* v. *United States*, 175 F. 2d 994, 1004-1005 (D.C. Cir.), certiorari denied, 338 U.S. 830.[14]

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[14] In the *May* case this was amply demonstrated by the Government—first in the Government's brief in the Court of Appeals (pp. 59-60), which persuaded the Court of Appeals that under the statute which now is § 281 the convictions of the two Garssons for paying compensation to Congressman May should be affirmed; and again, in the Government's brief filed in this Court (pp. 23-27, Nos. 100-102, 1949 Term) in opposition to the ensuing petitions for certiorari.

Accordingly, the issue is whether a federal regulatory agency is permitted to reject this federal policy totally, as FPC did here. This involves not only injury to the public interest, but also infringement of basic rights of contesting parties, particularly when the prevailing contestant's case is the product of such serious violations of the conflict of interest laws and policy. The issue calls for full review by this Court even more compellingly than did the *Dixon-Yates* case, *United States* v. *Mississippi Valley Co.*, 364 U.S. 520, where this Court granted certiorari because the conflict of interest issue presented by the company's claim for reimbursement "has a far-reaching significance in the area of public employment and involves fundamental questions relating to the standards of conduct which should govern those who represent the Government in its business dealings." (364 U.S. at 523).

**2. Refusal to Follow Principles of Dixon-Yates Decision**

The Court of Appeals has refused to follow and apply principles which this Court found controlling in the *Dixon-Yates* case, *United States* v. *Mississippi Valley Co.*, 364 U.S. 520, in at least two important respects.

The Court of Appeals relied on the fact that the Government had not instituted any criminal prosecution (p. B-4, *infra*). But *Dixon-Yates* makes clear that such fact confers no immunity against proper sanctions being imposed for the wrongful course of conduct pursued. 364 U.S. at 563.

The Court of Appeals apparently thought it decisive that "no corrupt or venal motive is shown on the part of Seattle or the Bureau of Reclamation engineers" (p. B-5, *infra*). But as *Dixon-Yates* established with respect to 18 U.S.C. § 434 (a companion conflict of interest statute), it is the "inherent difficulty in detecting

corruption" which requires that the sanction be imposed even if the party involved "ostensibly appears entirely innocent". 364 U.S. at 565. Mr. Justice Holmes put the matter similarly for the Court in *Hazelton* v. *Sheckells*, 202 U.S. 71, 79 (invalidating contracts with fees contingent on obtaining Congressional action), saying that the objection "rests in their tendency, not in what was done in the particular case. . . . The court will not inquire what was done. If that should be improper it probably would be hidden and would not appear". See also *Tool Co.* v. *Norris*, 2 Wall. 45, 54-55.

### 3. Need for Correcting Serious Departure from Congressional Purposes

The Court of Appeals has so effectively thwarted Congress' purposes on a matter of public importance that an exercise of this Court's supervisory jurisdiction is called for. What Congress established as an essential code of conduct, the Court of Appeals has minimized beyond recognition. By characterizing and excusing these occurrences as merely "a technical violation" of the conflict of interest laws (pp. B-4 and B-5, *infra*), the Court of Appeals has manifested exceptional insensitiveness to the legislative objectives.

Its disregard for the statutory standards likewise led the Court of Appeals to conclude that what happened here was not "the 'influence peddling' at which § 281 was aimed" (p. B-5, *infra*). But the scope of Section 281 is by no means limited to situations where "influence peddling" is proven or provable—as the Attorney General's recent opinion shows (p. 26, *supra*) and as the statute's terms make clear. Instead Section 281 establishes prohibited areas of conduct so that in the particular case no inquiry need be made as to whether, or how much, the outcome was affected by "influence peddling".

More than fifty years ago this Court said "The scope of the statute [now Section 281] is, in our judgment, most manifest, and the nature of the offense denounced cannot well be made clearer than it has been made by the words used to express the legislative intent". *Burton* v. *United States*, 202 U.S. 344, 370. The unequivocal prohibitions surely should make it impossible for any license applicant—and particularly one confronted with Interior Department opposition—privately to retain and pay for services of regular full-time Interior Department employees who at the same time continue their Government service. The broad statutory policy plainly makes it unnecessary to ascertain whether such an applicant was or was not acting corruptly, or acting with a hope to soften or dilute the Interior Department's opposition.

Here the violations were neither "technical" nor trivial. Winter's position was Chief of Hydraulics Machinery Branch of the Bureau of Reclamation; the other Bureau employees who worked on Seattle's projects were likewise Government experts in their respective fields. No one now can say how extensively their participation affected the examiner (who did state he found Winter "most impressive"—p. 15, *supra*), or the FPC staff, or others in FPC, on questions of cost, power production, financial feasibility, mine damage, and other elements of the two competing applications on which comparison was being made. No one now can say how this contested case would have been decided by FPC if Winter and the other Bureau of Reclamation employees had not been working for Seattle—or if their tainted evidence, so vital to Seattle's case, had been wholly excluded from the record.

Analogy will emphasize the enormity of the error and the need for this Court's review. Suppose, for

example, that the Federal Trade Commission's chief economist were to hire himself out for pay to a natural gas company to prepare, in after-hours, economic studies which the gas company intended to use in an FPC acquisition proceeding being contested by the United States and others on the ground that antitrust violations were involved (compare *California* v. *Fed. Power Comm'n*, 369 U.S. 482). Should any court sustain FPC if FPC approved the acquisition on the basis of testimony which the gas company had paid this federal employee to develop and present? Should any court allow the Civil Aeronautics Board to award a contested route to an airline on the basis of testimony by a Congressman whom the airline had paid to develop and present an evidentiary case in support of the airline's application? Compare *Burton* v. *United States*, 202 U.S. 344.

Such questions permit only one answer if the integrity of the public service and of federal administrative proceedings is to be preserved. The decision below has placed the Court of Appeals, as well as FPC, in the position of "affirmatively sanctioning the type of infected bargain which the statute outlaws and . . . depriving the public of the protection which Congress has conferred". *United States* v. *Mississippi Valley Co., supra*, 364 U.S. at 563.

A need thus has been created for this Court to establish, clearly and beyond doubt, that the services of federal employees are not for sale to litigants in federal proceedings where the Government has substantial and direct interests at stake, and that a litigant who resorts to such tactics is to be rebuffed rather than rewarded. The Court of Appeals decision has completely frustrated the legislative objective. It is a de-

cision which, unless promptly corrected, can be expected to have far-reaching and unwholesome consequences at a time when both the Executive Branch and the Congress are striving to achieve higher standards of integrity in the conduct of the Government's affairs.

## CONCLUSION

For each and all of the foregoing reasons certiorari should be granted.

Respectfully submitted,

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